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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE, *Petitioner*,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, *Respondents.*

On Writ of Certiorari to the Court of Appeals of the State of New Mexico

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BRIEF FOR THE RESPONDENTS

JURISDICTION

Respondents are dissatisfied with the statement of the Petitioner as to the grounds on which jurisdiction of this Court is invoked. The following additions and inaccuracies are noted:

(1) There is nothing in the record to support Petitioner's assertion that the business enterprise

was "... by necessity ..." located primarily on United States lands.

(2) The ski resort, which is owned and operated by Petitioner, is on lands belonging to the U.S. Forest Service which have been leased to the Petitioner for a period of thirty years. (App. 3).

QUESTIONS PRESENTED

(1) Can the State of New Mexico impose its compensating use tax upon the use of tangible personal property, owned by an Indian Tribe, and use outside the boundaries of the Tribe's reservation?

(2) Can the State of New Mexico impose its gross receipts tax upon the receipts of an Indian Tribe from the operation of a ski resort exclusively owned by the Tribe and located almost entirely outside the boundaries of the Tribe reservation?

STATEMENT

The Respondents wish to correct some inaccuracies in the Petitioner's statement of the case:

(1) There is nothing in the record to support Petitioner's assertion on pages 7 and 8 of its Brief that "..., the facilities at the ski area are under federal control through the Department of the Interior the same as any facility located within the actual boundaries of the reservation."

(2) There is nothing in the record to support Petitioner's assertion on page 8 of its Brief that the purchase of materials were subject to and approved by the Bureau of Indian Affairs "..., all as outlined in 25 C.F.R. pt. 91." The full statement of fact concerning this matter is found

in paragraph 10 of the Stipulation of Facts before the New Mexico Court of Appeals. (App. 5 and 6).

SUMMARY OF ARGUMENT

The Petitioner has chosen to engage in business activity as a ski resort outside the boundaries of its reservation. As a result of these activities, New Mexico gross receipts tax was imposed on the Petitioner's receipts from sales of services and tangible personal property and New Mexico compensating tax was imposed on the use of materials used to construct two ski lifts at the ski resort. The State of New Mexico has authority to impose these taxes pursuant to its Enabling Act and was not otherwise prohibited by law from imposing these taxes.

A. The United States has not exercised its powers under the Commerce Clause of the United States Constitution to regulate commerce with the Petitioner. U.S. Const., Art. I, § 8, cl. 3. No regulation of buyers of Petitioner's services or tangible personal property is shown in the facts of this case and Petitioner is not regulated with respect to persons to whom it sells. Transactions whereby Petitioner purchased materials to construct the ski lifts were only slightly controlled by the United States Department of the Interior and that control was not sufficient to preempt state taxation.

The Enabling Act for New Mexico and the Tribe's Treaty of 1852 with the United States are not in conflict. Pursuant to the Treaty, exclusive jurisdiction over the Tribe was vested in the United States. The United States exercised jurisdiction when Congress enacted the Enabling Act for New Mexico. The En-

abling Act granted New Mexico authority to impose the taxes at issue here.

B. The Tribe has not demonstrated that there has been an interference with its right of reservation self-government under the tests set forth in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), and *Williams v. Lee*, 358 U.S. 217 (1951).

The state's power to tax should not be crippled by extending the concept of interference with Tribal reservation self-government to situations where there is only remote or only possible future interference with the exercise of the functions of government.

Even if there was interference with the business activity of the Tribe, due to the imposition of the taxes, that interference was not with a governmental function, but with a proprietary function of the Tribe.

C. The Tribe is not a federal instrumentality under any of the tests set forth in current decisions of this Court.

ARGUMENT

I

THE STATE OF NEW MEXICO HAS AUTHORITY TO TAX THE PETITIONER

Petitioner has chosen to engage in business in the State of New Mexico outside the boundaries of its reservation. By so doing, it has entered into competition with other business entities. The United States Congress has provided no exemption from the state taxes at issue here for Indian Tribes when they engage in this form of business activity outside their reservations. The taxes imposed upon Petitioner are consistent with both its Treaty of 1852 with the United States (App. 9 to 12) and the Enabling Act for New

Mexico, Chapter 310, § 2, Clause 2, 36 Statutes at Large 557 (1910).

Exclusive jurisdiction over the Mescalero Apache Tribe is not vested in the federal government. The Tribe's Treaty of 1852 specifically provided in Article 1 that it acknowledged and declared itself to be under the laws, jurisdiction, and government of the United States and that it submitted to the power and authority of the United States. 10 Stat. 979; (App. 9). The Treaty became effective March 25, 1853. The State of New Mexico was admitted to the Union on January 6, 1912. 37 Stat. 1723. The Enabling Act for New Mexico is dated June 20, 1910. The Enabling Act was clearly enacted under the power and authority of the United States and it provided in part:

> "... *but nothing herein*, or in the ordinance herein provided for, *shall preclude the said state from taxing, as other lands and other property are taxed, any lands or other property outside an Indian reservation owned or held by an Indian,* save and except such lands as may be granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that such lands shall be exempt from taxation by said state so long and to such extent as Congress has prescribed or may hereafter prescribe." (emphasis supplied)

This provision is very similar to the Constitution of New Mexico, Article XXI, § 2.

The Bureau of Revenue's position is that the Tribe's use of property outside its reservation and its receipts from business activity almost entirely off its reservation are not exempted from taxation by the Enabling Act and that the Enabling Act confers jurisdiction to tax.

The taxes at issue here are not taxes on property. The gross receipts tax is a privilege tax and the compensating tax is an excise tax. Both are measured by the value of property, the property being the Tribe's gross receipts from its off-reservation business activity and materials used to construct two off-reservation ski lifts. (App. 5 and 6). A tax upon the use of property is not a tax upon the property itself. See *United States v. City of Detroit*, 355 U.S. 466 (1958); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971, U.S. cert. denied February 22, 1972. The incidence of the gross receipts tax at issue here is not on property itself but on the Tribe's sale of services. Compare *Sullivan v. United States*, 395 U.S. 169 (1969). The exemption contained in the Enabling Act with regard to lands which are after acquired by grant or confirmation, exempts the *lands* from taxation; it does not provide any exemption from the taxes at issue here.

The clear purpose of the Enabling Act was to allow the state to tax the business activities of Indians or Indian Tribes, particularly when these business activities occurred outside the Indian Reservation and outside lands granted or confirmed to Indians or Indian Tribes. The Act provided that: ". . . nothing herein . . . shall preclude the . . . state from taxing, as other lands and other property are taxed, any lands or other property outside an Indian reservation owned or held by an Indian, . . ." The purpose of the Act was to put off-reservation Indians on an equal footing with non-Indians with respect to payment of a non-discriminatory tax. There was also perhaps an added purpose of putting New Mexico on an equal footing with the original states with respect to jurisdiction to tax. Compare *Ward v. Race Horse*, 163 U.S. 504 (1896).

There was no federal control present over the Tribe with regard to the persons to whom it sold amusement services and tangible personal property. Neither the seller nor the buyers were controlled. There was also no federal control over the sellers to the Tribe of materials which became a part of the ski lifts, except to the extent that the Bureau of Indian Affairs approved the purchase of these materials. (App. 5). This measure of control by the Bureau of Indian Affairs was not substantially different than that usually exercised by lenders of money over borrowers of money. Because of this absence of federal control, the Tribe's reliance on the Commerce Clause, U.S. Const., Art. I, §8, cl. 3, is misplaced.

The cases, relied on by Petitioner, which found that Congress had exercised control pursuant to the Commerce Clause to a degree sufficient to preclude state control, indicate, without exception, a far greater degree of federal control than that present in this case. See *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965); *United States v. 43 Gallons of Whiskey*, 93 U.S. (3 Otto) 188 (1876); *United States v. Holliday*, 70 U.S. (3 Wall) 407 (1866). The degree of this control is indicated in the following quotation from the *Warren Trading Post* case:

> ". . . the Commissioner has promulgated detailed regulations prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed; penalties for acting as a trader without a license; conditions under which government employees may trade with Indians; articles that cannot be sold to Indians; and conduct forbidden on a licensed trader's premises. . . ." (380 U.S. 685, 689).

The regulation of Indian liquor sales, at issue in the *Holliday* and *43 Gallons of Whiskey* cases has been described by Professor Cohen as "sweeping." F.S. Cohen, *Federal Indian Law*, 91 (University of New Mexico Press 1942).

Generally, the control exercised by the United States over the use by Indians of their property off the reservation is not as great as the control exercised over their use of the property on the reservation. Therefore, it has been decided that personal property used off the reservation by an Indian is taxable by a state. See *United States v. Porter*, 22 F.2d 365 (9th Cir. 1927); *Federal Indian Law* 866 (U.S. Printing Office 1958); Compare *Pennock v. County Commissioners*, 103 U.S. 44 (1881). Under the facts present in this case, it appears clear that the United States Congress has not exercised its protective and regulatory power over the Tribe in a degree and manner which would pre-empt the State of New Mexico from imposing the taxes at issue here on the Tribe's off-reservation activities.

The State of New Mexico is not required, as is suggested at page 17 of the Brief of the Petitioner, to show that the existence of the ski resort created added burdens for the State. As has previously been argued, the taxes at issue are a privilege and excise tax. The facts are that the Tribe was engaging in off-reservation business activity, which for any other business entity would result in the imposition of these same taxes. The fact that this person had leased government lands on which to locate his business enterprise and had borrowed money from the United States to enable him to begin this enterprise would not have an effect on his liability for the taxes at issue here. The Tribe, in engaging in these business activities, is engaging in a

proprietary function rather than a governmental function and should be considered taxable as any other person unless some clear governmental immunity is established. Theoretical concepts of interference with the functions of government are insufficient. Compare *Oklahoma Tax Commission v. Texas Company,* 336 U.S. 342 (1949).

Immunity or exemption from these taxes is not granted by 25 U.S.C. § 465. The last paragraph of § 465 states:

> "Title to any lands or right acquired pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

The land upon which the Tribe's ski resort was located belonged to the United States Forest Service and was leased by the United States Forest Service to the Tribe. (App. 3). The title to the land was apparently in the federal government prior to the time the lease with the Tribe was entered into. No land was *acquired for* the Tribe. If title to the leasehold interest was taken in trust for the Tribe, the United States would have taken a leasehold interest in its own land, in trust for the Tribe. The Bureau of Revenue contends that the record in this case does not indicate that any lands or rights were acquired for the Tribe which could be taken in the name of the United States in trust for the Tribe, because the United States already had title to these lands or rights. For this reason, § 25 U.S.C. § 465 is irrelevant.

Assuming, for purposes of argument, § 25 U.S.C. § 465 is applicable, its application is limited to exempt-

ing lands or rights to land from state and local taxation, and as has previously been argued, the taxes at issue here are not upon lands or rights to land. The general rule is that exemptions to tax laws should be clearly expressed. See *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418 (1935); *Squire v. Capoeman*, 351 U.S. 1 (1956); *Holt* v. *Commissioner of Internal Revenue*, 436 F.2d 38 (8th Cir. 1966), cert. denied 386 U.S. 931. The scope of 25 U.S.C. § 465 is limited and it should not be extended, through a doctrine of remedial legislation, to the extent that it would be in conflict with the Enabling Act for New Mexico. Compare *United States v. Zacks*, 375 U.S. 59 (1963).

In *Stevens v. Commissioner of Internal Revenue*, 452 F.2d 741 (9th Cir. 1971), which is relied on by the Petitioner, it should be noted that the taxpayer did not question the Tax Court's holding that the income from lands leased from the Gros Ventre Tribe was taxable. Compare *Holt v. Commissioner of Internal Revenue, supra.* The income at issue in that case was from allotted lands and the decision relied on *Squire v. Capoeman, supra.* The General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331 et seq., provides that at the expiration of a trust period, the United States shall convey the land by patent "in fee, discharged of said trust and free of all charge or incumbrance whatsoever." 25 U.S.C. § 348. The Court of Appeals in *Stevens* noted that the provisions of the General Allotment Act were extended to lands purchased for the benefit of Indians by the Act of February 14, 1923, 42 Stat. 1246, 25 U.S.C. § 335. The Court then stated:

> "These acts manifest a Congressional intent that the benefits and restrictions of the General Allotment Act are to apply to all Indian allotments in

the absence of special legislation indicating a different intent. The construction is of course in accord with long-standing Congressional policy of treating Indians equally except where differences in tribal circumstances justify special legislation." (452 F.2d 741, 745).

Applying that concept, the Court then held that the income tax on income produced on the allotted land, and other lands acquired pursuant to allotment provisions and purchased by the taxpayer, were free of income tax because it constituted a charge or incumbrance. The Court also relied on long standing interpretations by the Department of the Interior. Respondents do not locate any statement in the case indicating that the lands were purchased with a loan acquired pursuant to 25 U.S.C. § 470.

In the *Stevens* case, the land from which the income was derived was restricted land. That situation is not present in this case. There is no provision governing the Tribe's lease of the land from the United States Forest Service which is comparable to the phrase ". . . free of all charge or incumbrance. . . ." contained in the General Allotment Act. That provision was crucial to the Court's decision in the *Stevens* case. Petitioner's reliance on the *Stevens* case is misplaced.

The Petitioner's reliance on *United States v. Rickert*, 188 U.S. 432 (1903), is also misplaced. That case concerned a tax on tangible personal property issued by the United States to Indian allottees which the Court said was, in fact, the property of the United States. A patent or grant after allotment had not been issued. The tax in the instant case was on the use of property by an Indian Tribe in a business enterprise and on the Tribe's receipts from that business enterprise. The Petitioner was not operating its business enterprise on

allotted lands and the tangible personal property which was the measure of the compensating tax was, in fact, the property of the Tribe. Restrictions with respect to allotted lands are not present in this case as they were in *Rickert*.

The Respondents contend that the *Rickert* case should also be considered in terms of the extreme variance of economic conditions and Indian endeavors in 1903 and at present. A tax imposed on an individual Indian's house and plow, which he used in farming in 1903 would have been a serious economic burden to that Indian and might have deterred him from even attempting to provide subsistence for himself on a small farm. The gross receipts tax at issue here is commonly passed on to buyers of property and services. The purpose of the compensating tax at issue here is to protect New Mexico merchants from unfair competition of importations into New Mexico without payment to another state of sales taxes. See N.M. Laws of 1939, ch. 95, § 1 [§ 72-17-1, N.M.S.A. 1953, repealed July 1, 1967].

There is no reason to believe that the imposition of either of these non-discriminatory taxes would have a detrimental effect upon the economic well being of the Petitioner. Other business entities survive and even thrive in New Mexico with these same taxes imposed on their activities. If Petitioner prevails in this case, the result could well be the beginning of the type of constant widening of the exempting process referred to with reference to lessees of Indian lands in *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949).

Respondents contend there is insufficient basis in law or in fact for granting the Petitioner the com-

positive advantage over persons engaged in similar business activities which exemption or immunity from the taxes at issue here would bring.

II

THE TAXES IMPOSED UPON PETITIONER DO NOT INTERFERE WITH ITS RIGHT TO SELF-GOVERNMENT

The Bureau of Revenue recognizes that if the imposition of the taxes at issue here interferes with the Tribe's right to reservation self-government, the tax must fail. See *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Williams v. Lee*, 358 U.S. 217 (1961). However, in this case, there are no facts showing such interference with the Tribe's right to reservation self-government.

Petitioner's contentions that the effect of the New Mexico Court of Appeals' decision is to restrict its choice of business ventures and limit its revenue raising projects are unsupported by the record.

Even if the Tribe decided to confine its business activity to its reservation, there is no indication that the influence state taxation could have on this decision would be an interference with the Tribal right of self-government.

In *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), it was recognized that fishing rights are of vital importance to Indians in Alaska. (369 U.S. 60, 6[illegible]). It is reasonable to assume that the revenue raised from fishing made these rights important and that this revenue would be used for the educational, social, and economic welfare of the Organized Village of Kake and the Aragon Community Association. Even though these facts can be reasonably inferred from the opinion, it was decided that state regulation of off-reserva-

tion fishing rights did not impinge upon treaty-protected reservation self-government.

The Respondents also contend that the off-reservation business activity of the Petitioner, which resulted in the imposition of the taxes at issue here, was not a governmental function of the Tribe. It was a proprietary function which state courts have, in tax cases, considered as resulting in taxable activity even though the entity upon whom the tax was imposed was a governmental unit. See *City of High Point v. Duke Power Company*, 120 F.2d 666 (4th Cir. 1941); *State Tax Commission v. City of Logan*, 88 Utah 406, 54 P.2d 1197 (1936); *City of Phoenix v. State*, 53 Ariz. 28, 85 P.2d 56 (1938). See also *City of Chanute v. State Tax Commission*, 156 Kan. 538, 134 P.2d 672 (1943); R. Ransom and W. Gilstrap, *Indians-Civil Jurisdiction in New Mexico-State, Federal and Tribal Courts*, 1 N.M. Law Rev. 196, 207-208 (1971).

The power to tax should not be crippled by extending the concept of interference with Tribal reservation self-government to situations where there is only remote, if any, influence upon the exercise of the functions of government. Compare *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342, 361 (1949).

III

THE PETITIONER IS NOT A FEDERAL INSTRUMENTALITY

The fact that the Tribe's ski resort is financed with money borrowed from the United States and that its operation is supervised to some degree by the Department of the Interior of the United States does not cause it to be virtually an arm of the United States Government. See dissenting opinion of Justice Marshall in *Agricultural National Bank v. State Tax*

Commission, 392 U.S. 339 (1968), and cases cited therein. The ski resort is not essential to the performance of government functions, as has previously been argued under Point II and even if the ski resort is considered a federal instrumentality, its immunity from taxation is removed because of the provisions of the New Mexico Enabling Act, as has previously been argued under Point I.

Petitioner's argument and the arguments presented by *Amicus Curiae* Native American Rights Fund and *Amicus Curiae* Association of American Indian Affairs, et al., seem to be premised on the assumption that the Petitioner was acting as a virtual ward of the government in engaging in the off-reservation business activities which resulted in the imposition of the tax at issue here. If this is the situation, then where is the tribal sovereignty and self-government which Petitioner so strongly urges under Point II? Respondents contend that Petitioner cannot be and is not both sovereign and federal instrumentality. Petitioner is not a federal instrumentality.

In *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936), it was decided that Oklahoma's taxation of income received by a member of an Indian Tribe as his share of the income from mineral resources of the Tribe, which the member was free to use as he saw fit, did not amount to state taxation of a federal instrumentality.

The Petitioner here is, of course, not an individual member of an Indian Tribe; however, the *Leahy* case does indicate a limit to the federal instrumentality doctrine described in *Federal Indian Law* 846-848 (U.S. Government Printing Office 1958). This doctrine appears to apply to lands and proceeds from

lands and is similar to the restrictions placed upon taxation of allotted lands. At pages 852 and 853 of *Federal Indian Law,* U.S. Government Printing Office (1958), the following paragraph is found:

> "It is to be noted, however that in the cases overruled the taxes were levied on private individuals or corporations organized for profit and which were only incidentally performing a Federal function. A distinction may be drawn between these cases, and cases involving a corporation organized solely to carry out *governmental objectives,* such as the tribal corporations organized under the Indian Reorganization Act of June 18, 1934, and it is probable that an attempt by a state to impose income or other types of taxes on such business organizations would still be held a direct burden on a Federal instrumentality." (emphasis supplied)

The case cited in support of this statement is *Clallum County v. United States,* 263 U.S. 341 (1923). That case concerned a corporation formed under a federal statute to purchase, produce, and manufacture aircraft in order to engage in World War I. The Court stated:

> ". . . This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account. The incorporation and formal erection of a new personality was *only* for the convenience of the United States to carry out its ends . . ." (emphasis supplied) (263 U.S. 341, 345).

It might be assumed that because of the fact that the loan to Petitioner was pursuant to 25 U.S.C. § 470, which provides for loans to "Indian chartered corporations", Petitioner was an Indian chartered cor-

poration formed pursuant to 25 U.S.C. § 477. If this assumption is made the fact still remains that the operation of the ski resort was not "only" for the convenience of the United States. It was for the benefit of the Mescalero Apache people. (App. 3 and 4). Therefore, the *Clallum County* case does not support the proposition that Appellant is a federal instrumentality.

Petitioner does not perform functions similar to or enjoy the same status with respect to federal statutes as did the Red Cross in *Department of Employment v. United States*, 385 U.S. 355 (1966). Petitioner is not a federal instrumentality and immune from the taxes imposed upon it merely because its activities may be useful to the federal government. Compare *Boeing Company v. Omdahl*, 169 N.W.2d 696 (N.D. 1969); *Laurens Fed. S. & L. Ass'n v. South Carolina Tax Commission*, 236 S.C. 2, 112 S.E.2d 716 (1960).

The *dissenting* opinion in *Agricultural Nat. Bank v. Tax Commission*, 392 U.S. 339 (1968), sets out several tests to determine if an institution or individual is a tax immune federal instrumentality, after noting that there is no simple test for making this determination and citing *Department of Employment v. United States, supra*. Justice Marshall, for the dissenters, states these tests as applied to the institutions or individuals are:

> ". . . whether they 'have become so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy governmental immunity,' . . .; whether they 'are arms of the Government deemed by it essential for the performance of governmental functions,' and 'are integral parts of [a government department and] . . . share in fulfilling the duties en-

> trusted to it,' . . . ; whether they have been 'so assimilated by the Government as to become one of its constituent parts,' . . . and whether the institution is regarded 'virtually as an arm of the Government,' . . ." (Citations omitted) (392 U.S. 339, 353).

Respondents submit that Petitioner does not meet any of these general tests.

The United States does business with a vast number of private parties and the trend has been to reject immunizing these private parties from nondiscriminatory state taxes as a matter of constitutional law. See *United States v. City of Detroit*, 355 U.S. 466, 474 (1958). To exempt or immunize Petitioner from the taxes at issue here would be to turn away from that trend and could result in serious economic problems for the State of New Mexico as a result of the otherwise welcome expansion of Indian business activities.

CONCLUSION

The federal policy of fostering economic development of the American Indian demonstrated in this case is similar to federal policies fostering the development of small businesses. 15 U.S.C. § 631 et seq. Similar programs have also been initiated to aid small farmers and others whose economic development the United States wishes to foster. The fact that entities or persons participate in these programs does not automatically exempt or immunize them from state taxes. If this were so, then the tax base for the states would be severely restricted.

Historically the State of New Mexico has had a very broad based gross receipts tax. See N.M. Laws of 1939, Chapter 73. This type of tax provides significant ad-

vantages for both the state and the taxpaying citizens of the state. See generally J. F. Due, *State and Local Sales Taxation* 89-91, Public Administration Service (1971). The potential restriction of that tax base presented by Petitioner's and *Amicus Curiae* arguments would result in seriously jeopardizing the ability of the State of New Mexico to serve all its citizens. The restrictions is not warranted by either the facts or the law in this case.

For the reasons stated, it is respectfully submitted that the Judgment of the Court of Appeals of the State of New Mexico should be affirmed.

Respectfully submitted,

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